Office - Supreme Court, U.S.
FILED
SEP 13 1982
ALEXANDER L. STEVAS,
CLERK

82-24

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1114

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRANCIS FORD, INC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Michael J. Esler
ESLER & SCHNEIDER
519 S.W. Park Avenue
Suite 510
Portland, Oregon 97205
(503) 223-1510

Counsel for Respondent

TABLE OF CONTENTS

	Page
Statement	2-3
Reasons Why The Writ Should Be Denied	3-10
Appendix A	1a-2a

TABLE OF AUTHORITIES

Cases:

FTC v. American Tobacco Co., 274 US 543, 544 (1927)	4
FTC v. Standard Oil Co., 355 US 396, 400-401 (1958)	4
NLRB v. Bell Aerospace Co., 416 US 267, 294 (1974)	3,5,6,7
NLRB v. Wyman-Gordon Co., 394 US 759, 764 (1960)	6,7
Patel v. INS, 638 F2d 1199 (9th Cir. 1980)	5
SEC v. Chenery Corp., 332 US 194, 202 (1947)	8

Statutes and Regulations:

Administrative Procedure Act	
5 U.S.C. §551(4)	7
5 U.S.C. §553	6
5 U.S.C. §706(2)(A)	9
Federal Trade Commission Act	
15 U.S.C. 45(m)(1)(B)	7
15 U.S.C. 57a	7

Page

Uniform Commercial Code
Article 9 3
§9-504 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1114

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRANCIS FORD, INC.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Francis Ford, Inc., respectfully requests that this Court deny the Federal Trade Commission's ("Commission") petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The opinion of the court of appeals is reported at 673 F.2d 1008, but for the convenience of the Court, citations to the opinion will be made to the

Commission's Appendix A.

STATEMENT

Respondent does not accept the Commission's statement of the case. The opinion of the court of appeals contains an accurate statement of the factual and procedural history of this case. Petition, App. A, at 1a-2a. The court of appeals statement is far more reliable than the statement of the Commission, which contains the same kinds of dramatic accusations and misstatements of the law concerning U.C.C. § 9-504, that has marked the Commission's approach throughout this case.

In contrast to other rulemaking versus adjudication cases that have come before this Court, in this case, the Commission had commenced rulemaking proceedings that covered the practices involved in the adjudication. Petition, App. A, at 2a, 4a-5a. The practices

involved are not exclusively regulated by the Commission under federal law, but are governed by state law, Article 9 of the Uniform Commercial Code [Ore. Rev. Stat. ch. 79]. Finally, the remedy sought was not a single cease and desist order, but was a comprehensive commercial accounting scheme to be applied nationally. Commission's Order, Petition, App. D., at 54a-56a; App. E. at 58a-73a.

REASONS WHY THE WRIT SHOULD BE DENIED

This Court has repeatedly held that the decision whether an agency must proceed by adjudication or rulemaking is, in the first instance, entrusted to agency discretion. This Court has held that there may be instances where agencies will abuse that discretion, NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974), but has not specified an exact standard to determine where an abuse lies, and has left this

determination to be made on a case by case basis.

This is exactly what the court of appeals has done in this case. It looked at all of the facts present, weighed these facts, and determined that the Commission abused its discretion.

This fact-weighing process, as this Court has also recognized, is one of the important functions served by the court of appeals in the administrative process, and it is inappropriate and unnecessary for this Court to review those kinds of determinations. FTC v. Standard Oil Co., 355 U.S. 396, 400-401 (1958). In FTC v. American Tobacco Co., 274 U.S. 543 (1927), this Court said:

> Proper decision of the controversy depends upon a question of fact. ...
>
> It now appears to us that this matter of fact is of no general importance. Accordingly, we adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations. 355 U.S. at 544.

In its petition, the Commission has taken a portion of one sentence out of context from the court of appeals opinion, and then argued that the court of appeals misstated law. This sentence is:

> The thrust of the Patel holding, therefore, is that agencies can proceed by adjudication to enforce discrete violations of existing laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application. Petition, Appendix A, at 3a.

First, this sentence is dicta. It merely describes the thrust of the holding of another Ninth Circuit decision, Patel v. INS, 638 F.2d 1199 (9th Cir. 1980). It is in no sense determinative of the outcome of the court of appeals decision in this case.

Second, this sentence is not an incorrect statement of law. The language quoted by the Commission from NLRB v. Bell Aerospace Co., 416

U.S. 267, 294 (1974), is to the effect that an agency may announce "new principles," not that it can change existing law, and establish rules of widespread application without going through the rulemaking procedures required by the Administrative Procedure Act, 5 U.S.C. § 553. In NLRB v. Wyman-Gordon Co., 394 U.S. 759, (1969), this Court said:

> The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. [Citation omitted.] They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention. [Emphasis added.] 394 U.S. at 764.

Bell Aerospace also suggests that where the rule changes existing law and where the rule will have widespread application, rulemaking would be appropriate. 416 U.S. at 294-95.

Finally, the Commission cannot deny that the general applicability of the rule is an

important fact to be considered in determining whether an agency should proceed by adjudication or by rulemaking. In addition to Bell Aerospace, 416 U.S. at 294, this is supported by the applicable statute defining a "rule," section 2(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 551(4) (quoted in App. A). NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (quoted supra).

The Commission also argues that Section 205 of the FTC Improvement Act, 15 U.S.C. 45(m)(1)(B) (quoted in App. A to this brief), permits it to establish rules through adjudication. Petition, at 13-14. Section 205 should not be read as a device for circumventing the proper rulemaking procedures. Section 205 was enacted at the same time as Section 202 of the FTC Improvement Act, 15 U.S.C. 57a, which for the first time expressly granted the Commission rulemaking powers. Now that the Commission has rulemaking powers, it should use

them, just as it started to do in this case. Court of Appeals Opinion, Petition, App. A, at 2a, 4a-5a. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947):

> Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct .... The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.

Section 205 should only be used where the Commission is dealing with a discreet violation, and not as a means of promulgating an entire commercial accounting scheme. Commission's Order, Petition, App. E, at 58a-73a. To do otherwise is to permit an abuse of the procedure set forth in Section 205 and an end run around the appropriate rulemaking procedures. As one commentator noted:

> For example, it would seem entirely possible under Section 205, but in my opinion, clearly inappropriate, for the

> Commission to seek out a small, especially vulnerable, business to develop a new principle of black letter law under the FTC Act as a means of obtaining a precedent which can, under Section 205, be applied throughout the industry. This would clearly frustrate the Congressional purpose in giving the Commission general rulemaking powers to be exercised through designated, and carefully designed, rulemaking procedures.
> Remarks of Caswell O. Hobbs, III, 45 ABA Antitrust L.J. 103, 115 (1976).

The only other notable argument made by the Commission is that the court of appeals did not say that the Commission abused its discretion, but that the Commission had "exceeded its authority." Petition, Appendix A, at 5a. It should go without saying that when an agency abuses its administrative discretion, it exceeds its authority. Section 10(e) of the Administrative Procedure Act, as amended, 5 U.S.C. § 706(2)(A).

For the foregoing reasons, the

Commission's petition should be denied.

DATED this 10 day of September, 1982.

Respectfully submitted,

ESLER & SCHNEIDER

Michael J. Esler

APPENDIX A

Section 2(c) of the Administrative Procedure Act, 5 U.S.C. 551(4), provides:

> "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing; ... .

Section 205 of the FTC Improvement Act (1975), 5 U.S.C. 45(m)(1)(A) and (B) provides:

> (A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of

subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice --

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.